they had left either by voluntarily resigning or those who are dismissed from service. I am of the view also that the logical interpretation of back-dating the circular to 1970 would only cover those who reached retiring age on that date. Then the circular pertaining to pension will be implemented in their case, but not if that particular person had, for example, been dismissed.

I also found substance in the respondent's last ground that this action had been filed too late, more than six years. I am with the respondent's counsel that the cause of action arose in 1975 by virtue of that circular. This originating summons was filed in 1987. If we were to take the position when the notice of termination was given, it is even more remote in time. It was contended by the plaintiff that at the Supreme Court it was agreed that the matter of this pension can be the subject of a separate suit. I cannot take it that the respondent was waiving the period of limitation there. I take it to mean that the plaintiff may file a separate suit in respect of pensions but it will still be subject to the suit being properly brought in good time.

For the reasons I have given, I find that the plaintiff was not entitled to the declaration prayed for. The plaintiff's action is dismissed with costs to be taxed.

Application dismissed.

Solicitors: *Hassan Yunos & Co*; *Abdul Raman Saad & Associates.*

Reported by *Yap Shao Sin*

Ong Kian Loo v Hock Wah Trading Co & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22-55-88
ABDUL MALEK J
31 OCTOBER 1989

Partnership — Assignee of share in partnership — Rights of assignee — Partnership Act 1961, s 33

The plaintiff commenced an action against the first defendant firm and several others in which he alleged that he was a partner of the first defendant firm by virtue of having taken the whole of the partnership share of his mother in the first defendant firm on 3 June 1988. However, the plaintiff's mother's name continued to remain in the business registration form. She died on 30 August 1988. The plaintiff had obtained orders granting various reliefs including the appointment of a receiver, an injunction against the defendants and an order for discovery and inspection of the partnership books and accounts. The defendants then applied for an order, inter alia, that the order obtained by the plaintiff be vacated. At the hearing of the defendants' application, counsel for the defendants contended that the plaintiff was only an assignee of the share of his mother in the partnership and that he therefore had no locus standi. It was contended for the plaintiff that the agreement by which he acquired his mother's share did not involve an assignment but a gift to the plaintiff out of love and affection.

Held, allowing the defendants' application:

(1) Although the agreement was couched in terms of a gift, it was in the nature of and was actually an assignment of the plaintiff's mother's share to the plaintiff. As such, s 33 of the Partnership Act 1961 applied and the plaintiff was not entitled to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books.

(2) It was clear from the evidence that the plaintiff's mother had actually withdrawn as a partner of the first defendant firm on 15 August 1988.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-401 of 1989.]

Legislation referred to
Partnership Act 1961, s 33

Gurbachan Singh for the plaintiff.
Chai Kai Wooi for the defendants.

Cur Adv Vult

Abdul Malek J: The defendants had applied by way of summons-in-chambers filed on 21 July 1989 upon a certificate of urgency for an order that the order made on 24 June 1989, namely:

(a) that Mr Richard Ong Guan Seng be appointed a receiver and manager to receive and manage the business of the first defendant firm until the disposal of this suit or further order of this honourable court;

(b) that the defendants do forthwith provide a true and accurate and authentic statement of profit and loss accounts from 1983 to 1989;

(c) that the plaintiff be a party to all the banking accounts of the first defendants;

(d) that all income of the said firm be deposited in the account of the first defendants held at Southern Banking Bhd, Langkap of which only the plaintiff shall be signatory;

(e) that the defendants do state the shares of profits of the said deceased and the plaintiff on the basis of 50% of the total share of profits within 14 days from the date of service of this order;

(f) that the first defendants' share and income be traced and all the movable and immovable properties, moneys and all other funds of all the defendants be subjected to such tracing;

(g) that the defendants be and are hereby restrained from selling, disposing, transferring or in any manner whatsoever dealing with all the movable and immovable properties of the defendants;

(h) that within seven days from the date of service of this order the defendants do declare and make a complete and comprehensive list of all the movable and immovable properties of, held and or owned by the defendants;

(i) that the defendants do forthwith hand over all books of accounts, ledgers, cash books, receipts, bills, invoices, cheque books, bank statements for the years 1980 to 1986;

(j) that the tenth defendants do forthwith cease to operate any business and all such business be conducted in the name of the first defendants;

(k) that the tenth defendants do render all statement of accounts, profit and loss accounts for the period of its entire operation within 14 days from the date of service of this order;

(l) that the plaintiff's and the said deceased's share of profits from 1 February 1983 at the rate of one-half (1/2) be paid to the plaintiff within 14 days from the date of service of this order;

(m) that the undertaking of the receiver be dispensed with and all expenses and fees of the said receiver be paid by the first defendants and the defendants be at liberty to set aside the order; and

(n) that the costs of this application be paid by the defendants;

be set aside and vacated, that all execution, attachment or other process be vacated and lifted, that damages suffered by the defendants be assessed and that the plaintiff be ordered to pay the damages so assessed, and that the plaintiff do pay the costs and such other orders the court deemed just and appropriate.

This appeal revolves upon the preliminary objection raised by learned counsel for the defendants with regard to s 33 of the Partnership Act 1961 (hereinafter 'the Act') and the first two paragraphs of the statement of claim. In the event, learned counsel was of the view that the plaintiff had no locus standi. It is necessary to reproduce both s 33 of the Act and the said two paragraphs:

> (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of the profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.
>
> (2) In the case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.
>
> 1 The plaintiff is a partner of the first defendant firm by virtue of having taken the whole of the partnership share of the plaintiff's mother Goh Kup Tee who was at all material times a partner of the first defendants (hereafter called the 'said firm').
>
> 2 The said Goh Kup Tee still remains as the registered partner in the business registration form although her share was given to the plaintiff on 3 June 1988. The said Goh Kup Tee died on 30 August 1988.

Learned counsel for the plaintiff was quick to retort that the facts of the case at hand did not involve an assignment but a gift of sale for love and affection and thus s 33 had no application. He added that unlike an assignment or a transfer, a gift did not involve consideration. It was merely a voluntary transfer without any contractual obligation. According to the plaintiff in his affidavit at encl 17, his mother (hereinafter 'the deceased'), who was one of the partners of the first defendant, had transferred all her shares in the said firm on 3 June 1988 to the plaintiff by way of gift out of love and affection for her natural and lawful son. This agreement is annexed to the affidavit as exh 'B'. In consequence thereof, the plaintiff was entitled to all the profits and dividends derived from the deceased's shares in the said firm from the date of the agreement. The last paragraph of the agreement categorically states that the deceased has no further interest or share or right in the said firm which shall now belong to the plaintiff. To my mind, although the agreement is couched in terms of a gift, it is in the nature of and is actually an assignment of the deceased's shares to the plaintiff. As such, I was of the view that s 33 of the Act applied.

Further, despite the agreement, none of the other partners had been aware and the business registration form had not been amended accordingly. As regards the transfer of shares, *Lindley On Partnership* at pp 383 and 384 states:

> When persons enter into a contract of partnership, their intention ordinarily is that a partnership shall exist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust one another, and yet be unwilling to place the same trust in anyone else. Hence it is one of the fundamental principles of partnership law, expressly recognized by the Partnership Act 1890, that no person may be introduced as a partner without the consent of all existing partners. If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them.
>
> Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members. The assignment, however, is by no means inoperative; on the contrary, it involves several important consequences, more especially as regards the dissolution of the firm and the right of the assignee to an account.

Again, at p 388, it states:

> Where a partner has an unconditional right to transfer his share, he may transfer it to a pauper, and thus get rid of all

liability as between himself and his co-partners in respect of transactions subsequent to the transfer and notice thereof given to them. But even in this case the transfer alone does not render the transferee a member of the partnership, and liable as between himself and the other members to any of the debts of the firm. In order to render him a partner with the other members, they must acknowledge him to be a partner, or permit him to act as such.

The deceased had passed away on 30 August 1988 but it is clear from the affidavits of the fourth defendant (encl 15) and the advocate and solicitor (encl 21) before whom the prescribed forms were signed, that the deceased and the third and ninth defendants had actually withdrawn as partners of the first defendant on 15 August 1988.

On these facts, I was of the view that the preliminary objections of learned counsel for the defendants should stand and hold that the plaintiff had no locus standi. Accordingly, I set aside and vacated the court order dated 24 June 1989, vacated and lifted all execution, attachment and any other processes, directed that damages suffered by the defendants by virtue of the 24 June 1989 order be assessed by the senior assistant registrar, and that each party bear their own costs.

Application allowed.

Solicitors: *Bachan & Kartar; Chai Chew & Partners.*

Reported by *PS Ranjan*

Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 31-745 OF 1985
VC GEORGE J
4 JUNE 1989

Civil Procedure — Application in chambers — Whether should be heard ex parte or inter partes — Circumstances in which application may be heard ex parte — Extension of time — Whether may be granted on ex parte application — Delay — Discretion of court — Rules of the High Court 1980, O 25 r 7, O 29, O 32 r 1, O 49 r 2 & O 52 r 2(2)

Contract — Foreclosure proceedings — Order for sale of land — Conditions of sale — Chargee — Whether in position of vendor — Variation of terms of order or of conditions — Time the essence of the contract — Application for extension of time — Consent of vendor not obtained — Deposit paid by purchaser — Breach of condition by purchaser — Forfeiture of deposit

Land Law — Foreclosure proceedings — Order for sale of land — Conditions of sale — Chargee — Whether in position of vendor — Variation of terms of order or of conditions — Time the essence of the contract — Application for extension of time — Consent of vendor not obtained — Deposit paid by the purchaser — Breach of condition by purchaser — Forfeiture of deposit — National Land Code 1965, ss 253, 256, 257, 258 & 259

Words and Phrases — 'Forfeit'

The plaintiffs, as chargees of a piece of land, took out foreclosure proceedings in which eventually the senior assistant registrar of the court by an order gave directions for the sale of the land. The order prescribed the conditions of sale. Condition 5 provided that the highest bidder shall be the successful purchaser. Condition 6 provided that the purchaser shall pay a deposit of 25% of the amount of the purchase price to the senior assistant registrar immediately after successfully bidding for the land. Condition 7 provided, inter alia, that the balance of the purchase price shall be paid within 30 days of the date of sale and that in that respect, time shall be of the essence of the contract. Condition 19 provided, inter alia, that if the purchaser shall fail to comply with the conditions of sale, the deposit shall be forfeited to the vendor. Condition 20 provided that the decision of the senior assistant registrar shall be final in all matters not provided for under the conditions.

The successful bid at the auction held on 20 September 1987 was made at the purchase price of $145,000 and the purchaser paid forthwith, in accordance with condition 6, the sum of $36,250 being 25% of the purchase price. The purchaser failed to pay the balance of the purchase price within 30 days of the date of sale. The balance sum was paid only on 29 September the following year.

On 11 June 1988, the plaintiffs filed a summons-in-chambers seeking an order that they were entitled to the sum of $36,250 as money forfeited to the vendor and for that amount less costs and expenses of the auction to be paid to them, such amount to diminish the amount that the charges secured. The summons was fixed for hearing on 24 August 1988. On 28 July 1988, the purchaser made an urgent application by summons-in-chambers seeking an extension of two months from 28 July 1988 to complete the purchase of the land. The application was heard ex parte on 30 July 1988 by the senior assistant registrar who purported to grant the extension. On 29 September 1988, just before the expiry of the extension, the purchaser paid the balance sum.

The plaintiffs made an application to set aside the ex parte order for extension. That application and the plaintiffs' application for release of the deposit were heard and dismissed with costs by the senior assistant registrar. The plaintiffs appealed against the orders.

Held, allowing the plaintiffs' appeal:

(1) In a forced sale pursuant to s 256 of the National Land Code 1965, the chargee at whose instance the sale is effected is to be regarded as the vendor. The defaulting chargor abdicates his right as registered owner of the land, vis-a-vis selling it, in favour of the chargee. The order for sale and the said conditions of sale were to be regarded as the sale and purchase agreement. No variations of the terms of the order or of the conditions of sale may be effected without the consent of the parties. However, where either the order or the conditions of sale or the Code specifically reserves any right to vary, then and only then may such a right be exercised.

(2) Condition 20 of the conditions of sale which provided that the decision of the senior assistant registrar shall be final in all matters not provided for under those conditions had no application to the case. The forfeiture provision on default was mandatory in nature.

(3) In the face of condition 7, particularly with the expressly emphasized provision thereto that time shall be of the essence of the contract and in the face of condition 19, the learned senior assistant registrar had no jurisdiction to entertain the ap-